when he had grown up. The brother was, in fulfilment of that ambition, content to earn very much less than he had been earning as a cake seller and caddie. Deceased might have got married later, or might have died a natural death. Again, and after calculations and consideration I fix the period at 5 years. Against the total, however, one has to deduct his upkeep. His mother fixed the family expenses at $1.00 a day or 20 cents a head, exclusive of clothes. If I say 25 cents a head inclusive of everything I think that would not be far out.

The damages thus work out as follows:—

Earnings from cake selling ..	15.00	per month
Earnings as a caddie ..	8.00	„ „
	23.00	„ „
Less upkeep at 25 cents per day	7.50	„ „
	17.50	„ „
Multiplied by 12 months ..	12	„ „
	210.00	per annum
Multiplied by 5 years ..	5	
	1050.00	
I allow funeral expenses at ..	25.00	
	$1075.00	

Total damages awarded is therefore fixed at $1075.00 which I find is the amount of damages suffered by the Plaintiff and which she is entitled to recover for her own benefit.

There will be judgment for the Plaintiff in this amount, with costs.

Judgment for Plaintiff.

(ORIGINAL CIVIL JURISDICTION)

CUSSEN, J.

September 30, 1938.

MADAM CHAH SIAM

v.

CHOP CHOY KONG KONGSI.

(SELANGOR CIVIL SUIT No. 77 of 1937)

Negligence—Fish Pond—Mining operations executed on adjoining land—Collapse of bank of pond—flow of water from pond into mine—right of lateral support.

The plaintiff had been since 1934 in occupation of a large fish pond on State land at Simpah in the mukim of Ampang. The fish bought as young fry were first reared in a small pond for about 3 months and then transferred to the adjacent large pond where they remained until they attained marketable size. The large pond was in fact an old worked-out tin mine. When work ceased the mine, apparently of the shallow open cast type, filled with water by rain or surface draining. At some time or other the land became State land. The land adjoining one end of the large pond was held under mining lease by the second defendant, the mine being styled "Choy Kong Kongsi" (the first defendant). The mine was worked by defendant since 1924. Towards the end of 1936 the working face of the mine was approaching near to the boundary next to the pond. The defendant obtained a permit to prospect by boring the adjoining State land including the land on which the fish pond was situated. He bored the land some time in December/January and applied for a mining title. His application was approved but a title was not issued to him until August 1937. On the night of the 4th April 1937 at about 8 p.m. the bank of the pond gave way and the water of the pond poured into the mine bearing away the greater part of the fish in the pond. In a suit against the defendants for loss suffered by her as the result of collapse of the bank of the pond brought about by the mining operations of the defendant the plaintiff relied for her claim on (1) the defendant's negligence in the carrying out of his mining operations and (2) her absolute right to support from the land comprised in the mining lease.

Held, that inasmuch as it had not been shown that the defendant was under any legal duty of care to his adjacent occupiers, the claim so far as it was based on negligence, failed.

Held, further that the land which contained the pond being entitled to such a degree of support as it would have required in its unexcavated condition, had no right to the additional support required by reason of its weakened state resulting from the excavation.

TRIAL OF SUIT.

Cussen, J.—The relevant facts in this case I find to be as follows.

The Plaintiff had been, since 1934, in occupation of a large pond on State land at Simpah in the Mukim of Ampang, Kuala Lumpur, which she used for the purpose of rearing fish. This pond (together with another smaller one) she occupied under a Temporary Occupation Licence issued under Rule 40 of the "Land Rules 1930". (Exhibit A = 1937 Licence; Exhibit E the 1934 Licence).

I will refer later to the difficulty created by the description and specification in these licences of the actual land covered by the licence.

The fish, bought as young fry, (see Exhibits B and B1) were first reared in the small pond for about three months and then transferred to the large pond where they remained until they attained marketable size (two to four catties a fish) when they were sold to a fish-dealer, who removed them by netting from the pond and disposed of them to retail dealers in the market.

This operation—re-stocking fry, rearing and selling—appears from the evidence of the fish-dealer, Tong Tuck Kee (supported by his account books), to have been repeated at intervals of about seven months, and the quantity of fish taken from the pond by the dealer to have been from 90 to 98 piculs (the price paid to the Plaintiff being by weight) which, taking the average weight of a single mature fish to be three catties, would mean in number over 3,000 fishes.

In September 1936 the small pond stocked with 4,300 fry, which in December were transferred to the large pond and about the 8th or 9th April 1937 were sold to the dealer at a price of $25 per picul.

This large fish pond was in fact an old worked-out tin mine; the land had been worked as an open cast mine by Chinese thirty years ago (according to the Defendant); when work ceased the mine, apparently of the shallow open cast type, filled with water, by rain or surface draining, resulting in this large pond —in size about 200 yards by 60 yards according to the Plaintiff and varying in depth from 10 to 20 or 30 feet. The two photographs Exhibits D and D1 show very clearly what this pond was like. At some time or other, either by surrender, cancellation, or expiration of the term of the lease, the land became State land.

The land adjoining one end of this pond is held under Mining Lease by the second Defendant, the mine being styled the "Choy Kong Kongsi" (the first defendant). This mine has been worked by Defendant since 1924. This mine is a deep open cast mine, worked by monitors (hydraulicing).

Towards the end of 1936 the working face of this mine (lot 1048 on Exhibit H) was approaching near to the boundary next to the pond, so the Defendant obtained a permit to prospect by boring the State land adjoining—including the land on which the fish pond was situated (Exhibit J). He bored the land some time in December—January, and applied for a mining title. His application was approved, but a title did not issue to him until August 1937, so that at the date relevant to this suit, i.e. in April 1937 this land was still State land over which the Defendant had no rights whatsoever.

The position in April then was that the steep working face of this mine had reached or almost reached the boundary of the lease and the bank of the adjoining fish pond.

The position was clearly a dangerous one; a collapse of the bank of the pond would mean that the water of the pond or the greater part of it would pour down into the mine. This danger was greater because the first half of April had a heavy rainfall (Exhibit L1 shows the rainfall at the Selangor Golf Club (which this mine adjoins) as 13.56 inches for the period 1st to 14th April).

The danger materialised; on the night of 14th April about 8 p.m. the earth gave way, a large breach opened and the water of the pond poured into the mine, bearing away the greater part of the fish in the pond.

The Plaintiff's husband, who lived near by the pond to care and tend the fish, saw what had happened, and at once came to Kuala Lumpur and reported to the Plaintiff. The Plaintiff visited the scene the next morning, and went and made a report at the Police Station, Ampang. The Corporal came with her and inspected the scene. He described the scene in his evidence, and I accept his description as truthful and substantially accurate.

Such are, I think, the relevant facts, and in so finding them I have accepted the evidence of the Plaintiff and her witnesses, and rejected that of the Defendant and his witnesses wherever it is in conflict therewith.

I find also that the Defendant and his mine Superintendent knew that this pond was occupied and used for rearing fish.

I do not think it is in any way relevant whether or not the Plaintiff or her husband (who lived beside the pond) knew that the State land on which the pond was would be mined by the Defendant.

Until her licence to occupy was cancelled by the Collector of Land Revenue she was lawfully in occupation of the fish pond; and as I have pointed out, the Defendant, even though the land had been approved to him, and he had actually paid the fees and premium, had no right whatever over the land. I am ignoring for the moment the difficulty arising from the form and contents of the licence.

The Plaintiff relies for her claim upon, firstly, negligence. It is alleged that the Defendant was negligent in the carrying on of his mining operations.

Now there is no evidence that the Defendant did any act outside the boundaries of his mining lease. What is alleged, and, in my opinion, proved is that

he mined so close up to the boundary of his lease adjoining the pond that, when heavy rains fell and the pond filled up, the bank of the pond, deprived of the support of the adjacent soil, gave way.

The Defendant did nothing outside his own land nor did he set loose or liberate any force or object from his own land on to the adjoining land.

The negligence alleged is then in the manner in which he conducted his mining operations on his own land. As I understand it, the particular negligence alleged is that knowing as he did or should have known of the danger of a burst through from the pond he nevertheless continued on mining a very steep mine-face right up to his boundary.

This conduct would, I think, clearly amount to negligence if there was any legal duty to take care owing from the Defendant to the Plaintiff. If there is no such legal duty owing to the occupant of the adjoining land then the Defendant is at liberty to mine in any way and to whatever extent he chooses, provided always he does not outstep the boundaries of his land.

No authority has been cited to me to establish that in such circumstances the lessee of land under a mining lease owes any duty of care to adjacent occupiers. I have come to the conclusion that no such duty exists and that, therefore, the Plaintiff's case, in so far as based on negligence, fails.

But the Plaintiff also relies upon the doctrine of the right of lateral support to land. It is claimed that the land—containing this pond—had an absolute right to support from the land in the mining lease adjoining, and that the Defendant, having removed the earth affording that support, is liable for the damage resulting therefrom.

Now the law to be applied is declared in section 2 of the 'Civil Law Enactment, 1937" (published in the Gazette of 12th March 1937).

Section 2 reads:—

> "2 (i) Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by Statute; shall be in force in the Federated Malay States; provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary....."

Under the common law of England it is clear that land in its natural state has an absolute right of support from the adjoining lands. The rule is set out in *Salmond's* Treatise on the Law of Torts (9th edition page 261) as follows:—

> "1. Every piece of land has a natural easement of support from the adjoining land.....
>
> 2. This rule relates only to the support of land in its natural condition—i.e., unburdened with buildings and unweakened by excavations. If additional support is needed because of any such alteration in the natural condition of the land, a right to it must be acquired by grant, prescription, or otherwise, and is not a natural incident of property".

Now applying that rule to the land in question, it is quite clear that this pond is simply an excavation caused by mining which has filled up with water. Under the rule as stated the land in its excavated state is not entitled to lateral support. The fact that a large volume of water, varying in amount from time to time, has filled the excavation does not alter the position; in fact the presence of such water, and the pressure exerted thereby, only increases the weakened state of the land resulting from the excavation.

Perhaps the position may be stated most clearly and accurately as that the land which contained the pond was only entitled to such a degree of support as it would have required in its unexcavated condition, and had no right to the additional support required by reason of its weakened state. In my opinion, on the facts of this case, it is fairly evident that it was the need of this additional support which caused the collapse of the land containing the pond.

I have assumed for the purpose of this question that the occupation of the Plaintiff of this large pond is such as would entitle her to the benefit of a right of support, if such right existed. But it must be observed that her Temporary Occupation Licence only authorised the occupation of an area of "under 5 poles" for two fish ponds, whereas this large pond in question covers an area of between two and three

acres. Whether, although her licence was so limited, the use and occupation which in fact she had of the whole pond was known to and allowed by the Land Office authorities has not been established except by the evidence of the Plaintiff herself. The one witness who might have given evidence to clear up this point, i.e. the Penghulu, was not called by the Plaintiff although subpoenaed by her as a witness. Whether such acquiescence, if it existed, on the part of the Land Office authority, would operate, as against a third party, i.e. the Defendant, to legalise the position of the Plaintiff at any rate to the extent of making her a lawful occupier of the land containing this large pond is a question which, in the view I have taken of the legal issues, it is unnecessary for me to decide.

The result then is that the Plaintiff's case fails and the suit is dismissed with costs.

Action dismissed.

[SPECIAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

December 12, 1938.

DYAL SINGH v. PANDAK DAHALIM.

(PERAK CIVIL APPLICATION No. 30 of 1938)

Land Code (Cap. 138) S. 134—land subject to lien whether attachable after judgment.

Where land is subject to a lien protected by a caveat, a judgment creditor may instead of enforcing his security proceed by way of attachment if he is minded to do so.

REFERENCE to the Judge by the Magistrate at Kuala Lumpur.

Morris Diamond for the Plaintiff.

Tuan Haji Abdul Wahab for the defendant.

Murray-Aynsley, J.—This is a reference by the Magistrate at Kuala Kangsar; the question referred is whether the fact that the Plaintiff has a lien protected by a caveat prevents attachment after judgment of the land subject to the lien. It was pointed out by counsel for the Plaintiff that at the material time the caveat had lapsed, and therefore on the facts the question does not arise in the present case.

The matter otherwise is not free from difficulty but I am of opinion that there is nothing to prevent a judgment creditor proceeding by way of attachment instead of by enforcing his security if he is minded to do so.

Reference answered.

[APPELLATE CRIMINAL JURISDICTION]

RAJA MUSA, J.

PUBLIC PROSECUTOR v. SARBAN SINGH.

(N.S. MAGISTRATE'S CRIMINAL APPEAL No. 26 of 1938)

Traffic Enactment No. 17 of 1937, Ss. 6, 12 (i)—using an unlicensed motor lorry—prosecution offering no evidence—conviction on a plea of guilty—inadequacy of sentence.

The respondent pleaded guilty to a charge of using a lorry without having it licensed, upon which he was convicted and ordered to pay costs which amounted to 75 cents. In inflicting the sentence the trial Magistrate took into consideration the fact that the prosecution offered no evidence. On an appeal to the Judge by the Public Prosecutor on the ground of inadequacy of sentence,

Held, that upon the respondent pleading guilty to the charge it was the duty of the trial Magistrate to call for evidence particularly in a matter, such as this, which affected his discretion.

MAGISTRATE'S CRIMINAL APPEAL.

Draper, Deputy Public Prosecutor, for the Public Prosecutor the Appellant.

Edgar Joseph, for the Respondent.

Cur. Adv. Vult.

Raja Musa, Ag. J.—In this appeal the Public Prosecutor has appealed on the ground of inadequacy of sentence.

The Respondent was charged with using his motor lorry on the 8th August, 1938, without having had it licensed. The Respondent pleaded guilty to that charge upon which he was convicted and ordered to pay the costs which amounted to 75 cents.

It appears that the Respondent owns a fleet of four lorries which he uses for trade purposes. Licences are payable quarterly and I am told that the licence fee of a lorry of this description is $20/- per month.

In inflicting the sentence which he did the learned Magistrate took into consideration the fact that the Prosecution offered no evidence To my mind this is entirely erroneous. It is the duty of a Magistrate to call for evidence particularly in a matter affecting discretion.

I considered the sentence inflicted in this case was entirely inadequate and I altered it to a fine of $75/- and the costs of the summons 75 cents.

Sentence Enhanced.